IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

FAO No. 289 of 1997.

Reserved on: 20.12.2005.

Date of decision: 29.12.2005.

Desh Raj ...Appellant

Versus

Smt. Kamlesh Kumari & Anr. … Respondents

Coram :

The Hon'ble Mr. Justice V.M. Jain, Judge.

Whether approved for reporting?[1]

For the appellant : Mr. R.L. Sood, Senior Advocate with Mr. Vikas Rajput, Advocate.

For the respondents: Mr. Bhupinder Gupta, Senior Advocate with Mr. Neeraj Gupta, Advocate, for respondent No. 1.

V.M. Jain, J. :

This appeal has been filed by the appellant – husband, against the judgment and decree dated 11.11.1996 passed by the District Judge, vide which the divorce petition filed by the appellant - husband under Section 13 of the Hindu Marriage Act was dismissed.

The facts which are relevant for the present appeal are that Desh Raj, husband, had filed petition under Section 13 of the Hindu Marriage Act, against his wife Smt. Kamlesh Kumari (respondent No.1) and one Naresh Kumar (respondent No.2), seeking dissolution of marriage by a decree of divorce. This petition was filed on 12.10.1995. In the said

[1]Whether reporters of Local Papers may be allowed to see the judgment?

petition, it was alleged that the marriage between the petitioner – husband and the respondent – wife was solemnized in the year 1988, according to Hindu rites and ceremonies and that after the marriage, the parties lived in the matrimonial home and out of the said marriage two children, namely Ms. Reena Devi, aged 4 years and Ms. Sumti Devi aged 3 years were born. It was alleged that the petitioner – husband had joined the Indian Army in the year 1979 and remained in service till 1990 when he was discharged on medical grounds. It was alleged that respondent No. 2 Naresh Kumar was also in the Army and had met the petitioner – husband at Sri Nagar in the year 1982 and they became friendly to each other. It was alleged that in the year 1990, the petitioner – husband had taken his wife Smt. Kamlesh Kumari, respondent No.1, to his place of posting namely Kota in Rajasthan and the parties lived together for about one month and at that time, respondent No.2 Naresh Kumar was also posted there and was living in the adjoining room and used to visit the petitioner frequently.

It was alleged that on 2.10.1995, respondent No.2 visited the house of the petitioner in the evening and stayed there for the night and on the next day, the petitioner and respondent No.2 went to the house of his brother-in-law Romesh Chand in village Budhan and on the same day, the petitioner came back from his house, while respondent No.2 stayed in the house of Romesh Chand. It was alleged that on 4.10.1995, respondent No.2 again came to the house of the petitioner and stayed in his new house at a distance of about 100 meters from his old house. It was alleged that on 5.10.1995 one Suresh Kumar, who was friendly to the petitioner, visited him in a Taxi in the morning hours and told him that his mother was seriously ill and was admitted in P.G.I.

Chandigarh and that some money was required, whereupon the petitioner went to the bank alongwith respondent No.2 and after withdrawing Rs.1900/- from the bank he gave Rs.900/- to Suresh Kumar and also promised to donate blood for the mother of Suresh Kumar. It was alleged that on the same day at about 4 P.M., the petitioner alongwith respondent No.2 as well as Suresh Kumar and one Mohinder Singh came to Hamirpur in a Taxi for collecting persons for donating blood and it was settled that Suresh Kumar will take those persons from Hamirpur early on the next morning and thereafter, they came back. It was alleged that respondent No.2 Naresh Kumar, Suresh Kumar and Mohinder Singh stayed at the house of the petitioner and at that time, respondent No.1 was sleeping on the first floor of the adjoining room. It was alleged that Suresh Kumar had parked his Taxi by the side of village road at a distance of 1 K.M.. It was alleged that on 6.10.1995 at about 3.30 A.M. (wrongly mentioned in the petition as 3.30 P.M.), the petitioner alongwith the aforesaid persons, namely Suresh Kumar and Mohinder Singh started for journey and walked 200 meters on foot when Suresh Kumar told him that the documents of his Taxi had been left at his house, whereupon , the petitioner told him that he would bring the papers from his house and accordingly, the petitioner came back to his house and he found that respondent No.2 Naresh Kumar was not sleeping on his bed. It was alleged that at that time, the petitioner heard murmuring in low voice from the first floor of the next room, where respondent No.1 Smt. Kamlesh Kumari was sleeping, whereupon the petitioner went to the said room and found the two respondents, namely Smt. Kamlesh Kumari and Naresh Kumar sleeping together and the Salwar of respondent No.1 was lying on one side of the bed. It was alleged that thereupon, the

petitioner asked respondent No.1 as to what was going on, but she did not give any satisfactory reply, and when he slapped her, she told him that respondent No.2 Naresh Kumar had forcibly opened her Salwar and had sexual intercourse with her. It was further alleged that when the petitioner asked respondent No.2 Naresh Kumar regarding the incident, respondent No.2 stated that he was not to be blamed for this. It was further alleged that in the meanwhile, Suresh Kumar and Mohinder Singh also returned to his house after waiting for him and they (Suresh Kumar and Mohinder Singh) tried to catch hold respondent No.2, but he immediately rushed away from the spot leaving his brief case at the spot. It was alleged that on account of the said incident, the petitioner could not go to Chandigarh alongwith Mohinder Singh and Suresh Kumar, who went there as per their programme.

It was alleged that in this manner, respondent No.1 Smt. Kamlesh Kumari voluntarily had sexual intercourse with respondent No.2 Naresh Kumar, taking advantage of the absence of the petitioner. It was alleged that respondent No.2 even on previous occasions had visited the house of the petitioner but the petitioner could not imagine that respondent No.2 was having evil eye on respondent No.1, who was living adulterous life with respondent No.2 . It was alleged that on 6.10.1995 at about 9.00 A.M., the petitioner and his mother took respondent No.1 to her parents and narrated the entire incident to them, but they showed their helplessness in the matter and thereafter the petitioner and his mother came back to their house and in the meanwhile, respondent No.1 also followed them without the knowledge of the petitioner. It was alleged that the petitioner told respondent No.1 that he would not keep her in his house, but she stayed there. It was alleged

that after the aforesaid incident, the petitioner was mostly living in the house of his maternal uncle. It was further alleged that after the aforesaid incident, the petitioner did not have any kind of cohabitation with respondent No.1, as they never lived under one roof. It was further alleged that on 7.10.1995 a Panchayat was convened, which was attended by the Pradhan and the Up Pradhan besides other respectable persons and at that time, the maternal uncle and the brother-in-law of the petitioner were also present in the said Panchayat and at that time, the Pradhan and the Up Pradhan had enquired from respondent No.1 about the incident and also asked her as to why she did not raise any hue and cry when respondent No.2 had approached her with malafide intention, but she could not give any satisfactory reply. It was alleged that respondent No.1 had treated the petitioner with mental and physical cruelty and the petitioner is entitled to the dissolution of marriage by a decree of divorce.

The said petition was contested by the respondents. In her written statement, respondent No.1 took up various preliminary objections including the plea that there was a valid compromise between the parties on 18.10.1995 and the petitioner was estopped from proceeding with the present petition, as he had accepted respondent No.1 as his wife and was living with her. On merits, it was alleged that besides the two children, a third child was also expected in near future. It was alleged that the petitioner used to maltreat respondent No.1 and also used to give her threats. It was denied that respondent No.2 was there on the day of the alleged occurrence or that she was sleeping in the next room. On the other hand, it was alleged that respondent No.2 was with the petitioner always. It was alleged that all these persons came

there drunk and started uttering and illegible and nonsense language and at that time, the door of the room in which she was sleeping was bolted from inside and she did not open it, whereupon those persons fully drunk threatened her, but still she did not open the door, whereupon they went away. It was denied that she was lying naked keeping the Salwar away or that respondent No.2 was in that room. It was alleged that it was a false story, keeping in view the fact that respondents would not leave the door open if they were to indulge in any such act. It was alleged that infact, the petitioner was in the habit of drinking and he used to maltreat respondent No.1 and used to give her beatings etc. on several occasions. It was alleged that she had complained to her father when the petitioner had given her beatings, whereupon her father had approached the police and at that time, the petitioner had expressed regret and had promised not to ill treat or abuse her in future, vide compromise referred to above and thereupon, she went to her in-laws house as per the compromise. It was alleged that the petitioner had gone to the house of Smt. Gayatri Devi, a widow living alone with her children and started staying there, for the reasons best known to him, more often than his own house. It was alleged that the entire story was a concocted one and respondent No.2 may be colluding with the petitioner. It was alleged that on 18.10.1995, the petitioner had to admit that he had leveled false allegations and had compromised not to ill treat her or to beat her and had also promised to maintain her. It was alleged that the petitioner had sex with respondent No.1 many times before and after 18.10.1995. It was denied that any Panchayat was held on 7.10.1995. On the other hand, it was alleged that a Panchayat was held on 18.10.1995, referred to above and thereafter, respondent No.1 had gone to the house of the

petitioner and stayed there till 28.11.1995, when she was again given beatings.

In his separate written statement, respondent No.2 controverted the allegations contained in the petition and denied the various allegations, with regard to the alleged incident dated 6.10.1995 and prior thereto.

Rejoinder was filed. On the pleadings of the parties, the learned trial Court framed the following issues:

1. Whether the respondent/wife is guilty of adultery in view of the allegations made in para 7,8 and 9, 10 to 15, corrected vide order dated 17.10.96 in the petition? If so, its effect? OPP
2. Whether there was a written compromise between the parties dated 18.10.95 as alleged? If so, its effect? OPR-1.
3. Whether the petitioner is estopped from filing the present petition on account of his act and conduct as alleged? OPR-1
4. Whether the allegations are vague, incomplete, contradictory and inconsistent as alleged? If so its effect. OPR-1
5. Relief.

Both the sides led evidence in support of their respective contentions. After hearing both sides and perusing the record, the learned District Judge dismissed the divorce petition filed by the petitioner – husband, vide judgment and decree dated 11.11.996, holding that the petitioner had failed to prove the various allegations leveled by

him against the respondents and was not entitled to the dissolution of the marriage by a decree of divorce. Aggrieved against the judgment and decree dated 11.11.1996 passed by the learned District Judge, the petitioner – husband filed the present appeal in this Court.

I have heard the learned counsel for the parties and have gone through the record carefully.

The learned counsel appearing for the petitioner – appellant husband submitted before me that the learned District Judge had erred in law in deciding Issues No. 1 and 4 against him and in favour of the respondents. It was submitted that from the allegations made by the petitioner – appellant – husband in the divorce petition, which was supported by the evidence led by him, it was duly proved on the record that the respondent – wife voluntarily had sexual intercourse with respondent No.2 on 6.10.1995 and as such, the petitioner - appellant husband was entitled to the dissolution of marriage by a decree of divorce.

However, I find no force in these submissions of the learned counsel for the appellant – husband. Under Section 13(1)(i) of the Hindu Marriage Act, 1955, the petitioner – appellant – husband would be entitled to the dissolution of marriage by a decree of divorce if respondent No.1 "had voluntary sexual intercourse with any person other than his or her spouse." In the present case, in the petition for divorce it was alleged by the petitioner – husband that on 6.10.1995, when he returned to his house (for getting papers of the Taxi), he did not find respondent No.2 Naresh Kumar sleeping on the bed on which he was sleeping earlier and at that time, the petitioner had heard murmuring in a low voice on the first floor of the next room where respondent No.1 Smt. Kamlesh Kumari

was sleeping, whereupon he went to the first floor of the next room and to his utmost surprise he found respondent No.2 sleeping on the same bed with respondent No.1 and her Salwar was lying on one side of the bed. It was further alleged by the petitioner –husband that initially his wife did not give him any satisfactory reply, but when he slapped her, she told him that respondent No.2 had forcibly opened her Salwar and had sexual intercourse with her and when he asked respondent No.2 in this regard, he told him that he was not to be blamed for this. Thus, from the allegations made in the divorce petition, at the most it could be said that the petitioner had seen his wife Smt. Kamlesh Kumari, respondent No.1 and respondent No.2 Naresh Kumar sleeping on the same bed on the morning of 6.10.1995 when he had returned to his house for collecting papers of the Taxi and at that time, the Salwar of respondent No.1 was lying aside. Further more, as per the allegations in the divorce petition, respondent No.1 had admitted before him that respondent No.2 had forcibly opened her Salwar and had sexual intercourse with her. Even if these allegations made by the petitioner–husband in the divorce petition are taken as correct, even then, in my opinion, it could not be said that the petitioner was entitled to the dissolution of marriage by a decree of divorce, on the ground alleged by the petitioner, since it could not be said that respondent No.1 Kamlesh Kumari had voluntary sexual intercourse with respondent No.2 on the morning on 6.10.1995, entitling the petitioner – husband to the dissolution of marriage by a decree of divorce. From the allegations made in the petition, as referred to above, at the most it could be said that the petitioner had seen respondent No.1 and respondent No.2 sleeping together on the same bed and at that time, the Salwar of respondent No.1 was lying aside and that initially respondent

No.1 had not given any satisfactory reply and after he had given slap to her, she had stated before him that respondent No.2 had forcibly opened her Salwar and had sexual intercourse with her. From these allegations it could not be said that there was any evidence on the record to show that respondent No.1 had voluntary sexual intercourse with respondent No.2, since there was no witness, including the petitioner, who may have seen respondent No.1 having sexual intercourse with respondent No. 2. So far as the alleged confession made by respondent No.1 before the petitioner is concerned, even if it is accepted, though denied by respondent No.1 in the written statement as well as during evidence, even then it could not be said that respondent No.1 Smt. Kamlesh Kumari had voluntary sexual intercourse with respondent No.2 on the morning of 6.10.1995, inasmuch as according to the alleged confession, respondent No.2 had forcibly opened the Salwar of respondent No.1 and had sexual intercourse with her. Such a sexual intercourse, even if proved, would not be a voluntary sexual intercourse, and the petitioner – husband would not be entitled to the dissolution of marriage, with respondent No.1 Smt. Kamlesh Kumari, by a decree of divorce.

As referred to above, from the reading of the allegations made in the divorce petition, it could not be said that the petitioner had been able to prove the allegations leveled by him against the respondents. Furthermore, even from the evidence led by the petitioner – husband, it could not be said that respondent No.1 Smt. Kamlesh Kumari had voluntary sexual intercourse with respondent No.2 Naresh Kumar on the morning of 6.10.1995, inasmuch as while appearing in the witness box as PW-1, it was alleged by Desh Raj, petitioner, that on his asking she told

him that Naresh Kumar had forcibly committed sexual intercourse with her. During cross-examination, he stated that he had seen them lying naked on the bed but he could not say whether they had sex or not. He stated that his wife had opened the Salwar and the same was lying under the bed, while the Pant of Naresh Kumar was also lying on the bed. During cross-examination, at one place, he had stated that he had seen Naresh Kumar having with sex with Kamlesh Kumari on the same day. However, in my opinion, this part of the statement of PW-1 Desh Raj, petitioner, cannot be accepted since it is beyond pleadings and even otherwise, he had contradicted himself when had earlier stated that when he saw them sleeping on the same bed naked, he could not say whether they had sex with each other or not. The testimony of PW-2 Suresh Kumar, PW-3 Babu Ram, PW-4 Dhani Ram and PW-5 Dev Raj, in my opinion, would also not improve the case of the petitioner, since none of these witnesses had seen the respondents having sexual intercourse with each other nor from the statements of these witnesses could it be said that respondent No.1 had voluntary sexual intercourse with respondent No.2 on the morning of 6.10.1995 and/or any other day, later or prior to 6.10.1995.

Keeping in view the facts and circumstances of the present case, in my opinion, it could not be said that the appellant – husband had proved that Smt. Kamlesh Kumar, respondent No.1, had voluntary sexual intercourse with respondent No.2, at any point of time.

Thus, keeping in view the provisions of Section 13(1)(i) of the Hindu Marriage Act, 1955 and keeping in view the facts and circumstances of the present case, in my opinion, no fault could be found with the findings of the learned District Judge on Issues No.1 and 4,

especially when the petitioner – appellant – husband had miserably failed to prove that he was entitled to the dissolution of marriage by a decree of divorce. Accordingly, I uphold the findings of the learned trial Court on Issues No. 1 and 4.

No other point has been urged before me in this appeal.

For the reasons recorded above, finding no merit in this appeal, the same is hereby dismissed.

(V.M. Jain),
Judge

December 29, 2005
(BSS)